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FIRST GENERAL COUNSEL'S REPORT

CELA

MUR 6425

DATE RECEIVED: November 8, 2010

DATE ACTIVATED: March 22, 2011

EARLIEST SOL: December 1, 2014

LATEST SOL: November 2, 2015

COMPLAINANT:

Russ Carnahan

RESPONDENTS:

Ed Martin

Ed Martin for Congress and Randall J. McArthur,
in his official capacity as treasurer
SaveAB.com for America

RELEVANT STATUTES:

2 U.S.C. § 434

2 U.S.C. § 441a

2 U.S.C. § 441b

2 U.S.C. § 441d

11 C.F.R. § 110.11(a)(1)

INTERNAL REPORTS CHECKED:

None

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

This matter stems from allegations that SaveAB.com for America ("Corporation"), a non-profit corporation, made a corporate contribution, via the use of its corporate name and logo, website, and e-mail list, to promote the 2010 congressional campaign of its founder, Ed Martin. Specifically, the complainant alleges that in December 2009, a letter publicizing Mr. Martin's congressional candidacy was posted on the SaveAB.com website and disseminated to approximately 40,000 individuals on the SaveAB.com e-mail list. Complainant alleges that this communication constituted an in-kind corporate contribution to Ed Martin for Congress and Randall J. McArthur, in his official capacity as treasurer ("Committee"), in violation of

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2 U.S.C. § 441b(a), and that the failure to include a proper disclaimer on the website and e-mail constitutes a violation of 2 U.S.C. § 441d.

Ed Martin, on behalf of all of the respondents, denies the allegations. As discussed below, Mr. Martin maintains that the website and the mailing list used for the communication belonged to specific individuals associated with an unincorporated grass roots movement. Mr. Martin claims that although he formed the corporation to undertake additional activities in support of that movement, the corporation was never used for any activities as a successor to the unincorporated movement, and never owned any assets. Further, the corporation was dissolved in March 2009, several months before Mr. Martin became a federal candidate, and approximately nine months before the communication at issue in this matter.

As set forth below, we recommend the Commission find no reason to believe that SaveAB.com, Ed Martin, or the Committee violated 2 U.S.C. § 441b(a). Further, to the extent that the use of the website and e-mail list could be viewed as contributions to the Committee by someone other than Mr. Martin, and to the extent such contributions may have had a value greater than the applicable \$2,400 contribution limit, we recommend that the Commission exercise its prosecutorial discretion and dismiss any possible violation of 2 U.S.C. § 441a. We also recommend that the Commission dismiss any possible violation of 2 U.S.C. §§ 434 and 441d by the Committee, and send a cautionary letter.

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

Ed Martin was the Republican nominee for the U.S. House of Representatives from Missouri's Third Congressional District for the 2010 election cycle. Mr. Martin filed his

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1 Statement of Candidacy, designating Ed Martin for Congress as his principal campaign
2 committee, on July 21, 2009.¹

3 During the summer of 2008, prior to his 2010 candidacy, Mr. Martin started a grassroots
4 movement to oppose the impending sale of Anheuser-Busch Companies, Inc. to a foreign
5 company. Various individuals within the movement used their own funds to buy a domain name
6 and set up a website (www.SaveAB.com), which was used to gather signatures for an on-line
7 petition and create a list of supporters' e-mail addresses.² Response at 1. On July 3, 2008, in
8 response to the movement's rapid growth and apparent need for financial structure in terms of
9 future activities, Mr. Martin founded a non-profit corporation, SaveAB.com for America.
10 Response at 2. However, about two weeks later, on July 14, 2008, it was announced that
11 Anheuser-Busch would be sold to the foreign company. The sale became final in November
12 2008. Although the movement was active during the summer of 2008, it had no activity
13 following the July 2008 announcement of the sale. See May 31, 2011, Response Clarification
14 ("Clarification") at 2. The Corporation dissolved on March 31, 2009,³ and the
15 www.SaveAB.com website was deactivated. Complaint Exhibits B and D; Response
16 Attachment 1.

17 During the year after the sale of Anheuser-Busch, the former leaders of the SaveAB.com
18 movement continued to receive requests for comments and inquiries about leading possible
19 boycotts of, or protests against, the foreign-owned Anheuser-Busch. Clarification at 1.

¹ Mr. Martin has recently filed his Statement of Candidacy to run for U.S. Senator in 2012; however, this matter involves his 2010 candidacy.

² Although the response identifies Mike Smith of Miken Technologies as the individual who set up and continually maintained the website, it does not identify the individual who purchased the domain name. A printout of domain name search results, attached to the complaint as Exhibit C, shows that www.saveab.com was registered to Scott Leindecke as of January 14, 2010.

³ The Articles of Dissolution list the dissolution date as December 17, 2008; however, Mr. Martin did not file the Articles of Dissolution and Termination with the Missouri Secretary of State until March 31, 2009.

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1 According to Mr. Martin, the number of these inquiries began to increase as the one-year
2 anniversary of the Anheuser-Busch sale approached in late 2009. *Id.* In December 2009,
3 Mr. Martin, in conjunction with other individuals associated with the SaveAB.com movement,
4 reactivated the website. Complaint Exhibit B; Response at 2; Clarification at 1, 2. When the
5 website went live again, it featured a single letter lamenting the sale of Anheuser-Busch,
6 thanking businesses who supported the movement, and informing supporters of Mr. Martin's
7 House candidacy. Notwithstanding the suggestion in the Response and Clarifications about the
8 need to respond to inquiries about SaveAB.com's position on purported plans to engage in a
9 boycott or protest, the letter on the website makes no mention of these topics. The portion of the
10 letter regarding Mr. Martin's congressional campaign stated:

11 Also, one of the original Saveab.com founders, Ed Martin, has decided to take
12 this fighting spirit to Congress. He is running for Congress in the Third
13 Congressional District right here in Missouri – this district includes the old
14 headquarters of A-B down on Pestalozzi Street. (Third Congressional District
15 consists of St. Louis City, St. Louis County, Jefferson County and St.
16 Genevieve)[.]

17
18 Ed Martin is running, as he said, to “fight for jobs, for the future and for the
19 American dream – which is all in jeopardy if we don't stop shipping our jobs to
20 Mexico and India and running up our debt to China!”

21
22 If you are interested in finding out more, or joining Ed Martin in this endeavor,
23 visit his website TODAY:

24 The letter then linked to a page on the Committee's website titled, “Welcome SaveAB.com
25 Friends.” This page invited visitors to sign up for e-mail updates, volunteer to help, and
26 “consider a financial contribution.” Complaint Exhibit E. The letter was also e-mailed, along
27 with the link to the Committee's website, from a www.SaveAB.com e-mail account to
28 SaveAB.com supporters. Although the letter claims to be reaching 85,000 supporters, both the

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1 complaint and various news articles report that the e-mail was sent to 40,000 supporters. *See,*
2 *e.g.,* Complaint Exhibit B.

3 Complainant alleges that the December 2009 www.SaveAB.com website and e-mail
4 constitute prohibited corporate contributions in the form of SaveAB.com for America's corporate
5 name, logo, website, and mailing list, in violation of 2 U.S.C. § 441b(a). Complainant further
6 alleges that Mr. Martin and the Committee failed to include proper disclaimers on the website
7 and e-mail, in violation of 2 U.S.C. § 441d(a).

8 Mr. Martin, on behalf of all of the respondents, expressly denies the allegations. Mr.
9 Martin asserts that the short-lived corporation never held any assets, made any purchases, or
10 conducted any organizational meetings. Response at 2; Clarification at 1. Rather, the activity of
11 the SaveAB.com movement was paid for out-of-pocket by the individuals associated with it, and,
12 upon dissolution, "anything that the participants created or gathered during the grassroots effort –
13 whether information, photographs, placard [sic], shirts, etc. – . . . was kept by each person
14 individually." Clarification at 1. Specifically, the website and the data it collected were
15 continually maintained by Mike Smith, the same individual who set up the website at the
16 beginning of the movement, much as the telephone system was continually maintained by
17 Mr. Martin. Response at 1; Clarification at 1. As the Corporation held no assets, it did not have
18 any assets to distribute when it dissolved. Response at 2.

19 Mr. Martin also asserts that the decision to create the December 2009 letter was primarily
20 his, and not that of any legal entity. Clarification at 1-2. Although he does not recall other
21 persons with whom he discussed the decision, Mr. Martin "feel[s] certain" that he spoke with
22 Mr. Smith because "[he] was the operator of the website and e-mail system." Clarification at 1.
23 He further explains that the letter was in response to multiple requests for interviews and

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1 statements on the one-year anniversary of the Anheuser-Busch sale, and was meant to thank
2 supporters and "end the discussion and questions" about the SaveAB.com effort. *Id.* There is no
3 indication from the response that any marginal costs were incurred or funds disbursed to place
4 the letter on the SaveAB.com website or to send the accompanying e-mail.

5 **B. Legal Analysis**

6 **1. Alleged Corporate Contributions**

7 A contribution is any gift, subscription, loan, advance, or anything of value made by any
8 person for the purpose of influencing any election for federal office. 2 U.S.C. § 431(8)(a)(1).
9 Commission regulations define "anything of value" to include in-kind contributions: the
10 provision of goods or services without charge or at a charge that is less than the usual and normal
11 charge. 11 C.F.R. § 100.52(d)(1).

12 The Federal Election Campaign Act of 1971, as amended ("the Act"), prohibits
13 corporations from making contributions from their general treasury funds in connection with any
14 election of any candidate for federal office. 2 U.S.C. § 441b(a).⁴ A candidate, political
15 committee, or other person is prohibited from knowingly accepting or receiving any corporate
16 contribution. *Id.*

17 The assets that allegedly constitute the in-kind corporate contribution – the SaveAB.com
18 name and logo, domain name, and e-mail list – were developed while SaveAB.com was a
19 grassroots movement, before it incorporated. Mr. Martin explains, for example, that two
20 individuals bought a domain name and set up a website at the time the movement was founded.

⁴ On May 16, 2011, the Eighth Circuit Court of Appeals, whose jurisdiction includes Mr. Martin's congressional district, upheld a federal district court decision denying a request for a preliminary injunction against a ban on corporate contributions to state candidates that is identical to 2 U.S.C. § 441b. *Minnesota Citizens Concerned for Life v. Swanson*, 640 F.3d 304 (8th Cir. 2011). This decision is in contrast with a recent ruling by a federal district court judge in Virginia that the 2 U.S.C. § 441b ban on corporate contributions to federal candidates is unconstitutional. *United States v. Danielczyk*, 1:11-cr-00085 JCC (E.D. Va. May 26, 2011). The Department of Justice filed a notice of appeal to the Fourth Circuit Court of Appeals on June 16, 2011.

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1 Furthermore, it appears that the Corporation did nothing to take control of these assets in the two
2 weeks it was operational: Mr. Martin specifically asserts that the Corporation never held any
3 assets and therefore had no assets to distribute upon dissolution. Rather, these items were
4 continually maintained by the individuals who created them. Moreover, the Corporation
5 officially dissolved four months before Mr. Martin became a candidate and eight months before
6 his decision to send an e-mail to the movement's supporters. That is, the Corporation did not
7 exist at any time that the assets could have been transferred to Mr. Martin in his capacity as an
8 agent of the Committee. Accordingly, we recommend the Commission find no reason to believe
9 that Ed Martin, Ed Martin for Congress, or SaveAB.com for America violated 2 U.S.C.
10 § 441b(a).

11 2. Potential Excessive Contribution

12 Although the provision of the assets does not constitute a corporate contribution, it still
13 arguably constitutes an in-kind contribution to the Committee. In accepting the assets at the time
14 he was a federal candidate and using them to endorse his federal candidacy, Mr. Martin must be
15 viewed as acting as an agent of the Committee.⁵ Even if there were a bona fide non-campaign-
16 related reason to contact the former supporters of the SaveAB.com movement, this
17 communication (which required the use of the website and mailing list) announced Mr. Martin's
18 candidacy to potential supporters, and was therefore of value to the Committee and in connection
19 with a federal election.

20 However, it is not clear which person or persons owned the assets at the time of the
21 December 2009 communication, and thus made the contribution. Individual members associated
22 with the SaveAB.com movement set up and continually maintained the assets using their own

⁵ Any candidate who receives a contribution in connection with his or her campaign shall be considered as having received such contribution as an agent of his or her authorized committee. 11 C.F.R. § 101.2.

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1 funds; for example, Mr. Smith operated the website and Mr. Martin provided the telephone
2 system. If any individual other than Mr. Martin made a contribution of more than \$2,400 for
3 either Mr. Martin's primary or general election campaign, it would violate the applicable
4 contribution limit. *See* 2 U.S.C. § 441a(a)(1)(A).

5 However, it appears that these assets may have been available to any of the founders of
6 the movement, and were not necessarily possessed by one individual. Accordingly, Mr. Martin,
7 who as the ~~candidate~~ was not subject to the \$2,400 contribution limit, may have had a valid
8 claim to the use of the website and mailing list.

9 The value of these assets is also difficult to determine. The Commission has previously
10 considered corporate names and trademarks to be things of value, so the provision of the
11 corporate name and logo here appears to constitute a contribution. *See* MUR 6322 (Sowers for
12 Congress) Factual and Legal Analysis (citing MURs 6110 (Obama Victory Fund) and 5578
13 (Wetterling for Congress)). However, while a widely-recognized trademarked corporate name
14 and logo may have significant value, *see, e.g.*, MUR 4340 (Tweezerman), the value of a short-
15 lived organization's un-trademarked name and logo, particularly one that was unsuccessful in its
16 primary objective, is less clear. Similarly, as the value of a domain name depends at least in part
17 on the value of the organization's name, especially where the two are identical, the value of the
18 www.SaveAB.com domain name is difficult to ascertain. The Commission has previously found
19 that an organization's e-mail list is a thing of value, *see, e.g.*, MURs 5876 (Bowman for
20 Congress) and 6127 (Obama for America), and has used varying formulas to determine that
21 value.⁶ While the value of the e-mail list could be estimated as being in excess of the \$2,400
22 contribution limit, *see fn 6*, the actual value of this particular list is unknown at this time.

⁶ The value of e-mail lists may vary widely based on criteria used to develop the list, the age of the list, and whether the list has been maintained/updated since its creation. In MUR 5876, the Commission estimated the value

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1 Given the difficulty in ascertaining the value of these assets, and considering that the
2 amount of any contribution is relatively small, further use of Commission resources for an
3 investigation is not warranted. Accordingly, we recommend the Commission exercise its
4 prosecutorial discretion and dismiss any possible violation of 2 U.S.C. § 441a(a). *See Heckler v.*
5 *Chaney*, 470 U.S. 821 (1985). We similarly recommend that the Commission exercise its
6 prosecutorial discretion and dismiss any violations of 2 U.S.C. § 434 for the Committee's failure
7 to report the receipt of any in-kind contribution, and send a cautionary letter to Ed Martin for
8 Congress.

9 3. Alleged Disclaimer Violations

10 The Act, as implemented through Commission regulations, requires that e-mail of more
11 than 500 substantially similar communications include a disclaimer when sent by a political
12 committee. 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(a)(1). Additionally, disclaimers must be
13 included on all internet websites of political committees that are available to the general public.
14 *Id.* If the communication is authorized by the candidate, his committee, or the agent of either,
15 but is paid for by any other person, the disclaimer must clearly state that the communication is
16 paid for by such other person and authorized by such candidate, committee, or agent.
17 2 U.S.C. § 441d(a)(2); 11 C.F.R. § 110.11(b)(2).

18 The December 2009 letter sent under the SaveAB.com logo was initiated and created
19 primarily by Mr. Martin, and appears to have been posted on the website and e-mailed to 40,000
20 recipients. Mr. Martin used Mr. Smith's access to and control over the e-mail list to disseminate
21 the e-mail. Mr. Martin, who is an agent of the Committee, authorized the e-mail and the use of

of a non-profit organization's mailing list as between \$65 and \$125 per thousand names. In MUR 6127, the Commission valued the corporation's mailing list at \$150 per thousand names. Based on these estimates, the value of a 40,000-person mailing list could be in excess of the \$2,400 limit.

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1 the Committee's logo in the e-mails with the link to the Committee's website. It appears,
2 however, that Mr. Smith paid whatever costs were associated with the dissemination of the e-
3 mail. Accordingly, the e-mail should have included a disclaimer stating that it was paid for by
4 Mr. Smith and authorized by Ed Martin for Congress.

5 Similarly, Mr. Martin primarily decided to reactivate the www.SaveAB.com website in
6 December 2009. Given that the letter referenced Mr. Martin's federal candidacy, he can be
7 viewed as acting as an agent of the Commission. At that time, however, the website was operated
8 by Mr. Smith, and the domain name was owned by Mr. Leiendecker. Accordingly, the website
9 should have included a disclaimer stating that the communication was paid for by Mr. Smith and
10 Mr. Leiendecker and authorized by Ed Martin for Congress.

11 It thus appears that Ed Martin for Congress violated 2 U.S.C. § 441d by failing to include
12 appropriate disclaimers on the website and e-mail, over which Mr. Martin, as its agent, had some
13 measure of control. However, while the communications did not contain the language required
14 by the statute, they did include identifying information. The communications were sent under
15 the heading of SaveAB.com, of which both Mr. Smith and Mr. Leiendecker were former leaders.
16 Similarly, the communications included the Committee's logo, which clearly stated "Ed Martin
17 for Congress," as the link to the campaign website. Given that the communications included
18 identifying information, and considering the minimal costs associated with sending the e-mail
19 and reactivating a website, we recommend the Commission exercise its prosecutorial discretion
20 and dismiss the violations of 2 U.S.C. § 441d and send Ed Martin for Congress a cautionary
21 letter. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

III. RECOMMENDATIONS

1. Find no reason to believe that Ed Martin, Ed Martin for Congress and Randall J. McArthur, in his official capacity as treasurer, and SaveAB.com for America violated 2 U.S.C. § 441b(a).
2. Dismiss, as a matter of prosecutorial discretion, any violations of 2 U.S.C. § 441a(a).
3. Dismiss, as a matter of prosecutorial discretion, any violation of 2 U.S.C. § 434 by Ed Martin for Congress and Randall J. McArthur, in his official capacity as treasurer, and send a cautionary letter.
4. Dismiss, as a matter of prosecutorial discretion, any violation of 2 U.S.C. § 441d by Ed Martin for Congress and Randall J. McArthur, in his official capacity as treasurer, and send a cautionary letter.
5. Approve the attached Factual and Legal Analyses.
6. Approve the appropriate letters.
7. Close the file.


P. Christopher Hughey
Acting General Counsel

6/20/11

Date

BY:


Stephen Gura
Deputy Associate General Counsel


Mark D. Shonkwiler
Assistant General Counsel


Margaret Ritzert
Attorney

Attachments:

1. December 2009 Letter



IT'S NOT JUST A ST. LOUIS BRAND.
IT'S AN AMERICAN BRAND.

THE OFFICIAL WEBSITE FOR SAVE AB.COM



Dear Fellow SaveAB.com supporter,

"We told you so."

We have a right to want to say this!

We are the nearly 85,000 men and women strong from across the country who signed up to try to stop the sale of Anheuser-Busch to a foreign company BECAUSE we knew that would happen:

- Massive layoffs
- Cuts in benefits for workers
- Movement of jobs from our hometowns to foreign capitals (and to New York City)
- Losses by the many civic groups and associations that A-B supported.

All of this came true. It is sad and it makes many of us angry.

Still, the future in America is bright but we need to continue to find the right causes to fight for. We had great partners/businesses help us in our fight - including Milken Technologies, Al Hrabosky's Ballpark Saloon, The Goodson Co., and the Carpenters' and Laborers' of St. Louis. These and others deserve our support and our attention. Please help them.

Also, one of the original Saveab.com founders, Ed Martin, has decided to take this fighting spirit to Congress. He is running for Congress in the Third Congressional District right here in Missouri - this district includes the old headquarters of A-B down on Pestalozzi Street. (Third Congressional District consists of St. Louis City, St. Louis County, Jefferson County and St. Genevieve)

Ed Martin is running, as he says, to "fight for jobs, for the future and for the American dream - which is all in jeopardy if we don't stop shipping our jobs to Mexico and India and running up our debt to China!"

If you are interested in finding out more, or joining Ed Martin in this endeavor, visit his website TODAY:



"We told you so." We, the supporters of SaveAB.com have a right to say it ... but it's not satisfying. It's sad. Instead, let's say proudly "We have not yet begun to fight!"

Founders of SaveAB.com.

Powered by Milken Technologies

Attachment 1
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